Office - Supreme Court, U.S.
FILED
APR 16 1984
ALEXANDER L. STEVAS,
CLERK

Nos. ~~83-1339~~ and 83-1340

In the Supreme Court of the United States

OCTOBER TERM, 1983

LANCE E. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

MILTON B. DORISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1339

LANCE E. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-1340

MILTON B. DORISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in upholding the district court's denial of their motions for a change of venue. The question presented is identical to that presented by the petitioner in *Nardone* v. *United States*, No. 83-5266, in which certiorari was denied on November 28, 1983.

On April 12, 1983, petitioners were indicted in the Southern District of West Virginia on one count of conspiracy, in violation of 18 U.S.C. 371, and on multiple counts of aiding

and assisting in the preparation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). The indictments grew out of petitioners' roles in establishing and promoting an allegedly fraudulent tax shelter scheme involving the use of coal mining limited partnerships. Following their arraignment, petitioners moved for a change of venue to the districts in which they resided, citing 18 U.S.C. 3237(b). The district court denied their motions, citing the Fourth Circuit's decision in *In re United States (Nardone)*, 706 F.2d 494 (1983), cert. denied, No. 83-5266 (Nov. 28, 1983). The Fourth Circuit in *Nardone* adopted the reasoning of the Second Circuit in *In re United States (Clemente)*, 608 F.2d 76, 80-81 (1979), cert. denied, 446 U.S. 908 (1980), to the effect that Section 3237(b) —

> is not a sword enabling the taxpayer to transfer prosecution to his district of residence in cases * * * where the Government seeks to establish venue wholly apart from any use of the mails. The statute does not enable a taxpayer who has violated the law in a district by means other than use of the mails to escape prosecution in that district simply by mailing a letter. We construe § 3237(b) to apply, at most, to tax prosecutions that involve the use of the mails in the sense that a mailing, whether or not alleged in the indictment, is the basis on which the prosecution seeks to establish venue in a district other than the taxpayer's district of residence.

Upon the district court's denial of their motions, petitioners sought a writ of mandamus from the court of appeals, which held that *Nardone* had "declared the law of [the] circuit" on the question presented, and said that it was neither willing nor able "to reexamine the question of statutory construction [that *Nardone*] carefully addressed" (83-1339 Pet. App. 6a-7a). The petitions for writ of mandamus were accordingly denied.

Petitioners contend that the court of appeals erred in following *Nardone*, making essentially the same arguments that the petitioner in that case made. Regardless of the merits of petitioners' contentions, they are not ripe for review by this Court. If petitioners are acquitted after trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions, together with any other claims they may have, to this Court in petitions for writs of certiorari seeking review of final judgments against them. Review of the court of appeals' decision now would thus be premature.[1]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

---

[1]Over a year has passed since the indictment in this case was issued. Further interlocutory review would cause serious additional delay in the trial of the charges against petitioners.

Because this case is at an interlocutory stage, we are not responding on the merits of petitioners' contentions. We will do so if the Court requests.

DOJ-1984-04